

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
January 15, 2015

v

ANTHONY MICHAEL FLINT,

Defendant-Appellee.

No. 321213
Wayne Circuit Court
LC No. 94-000892-FC

Before: DONOFRIO, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In 1995, a jury convicted defendant of first-degree felony murder, MCL 750.316, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to two years' imprisonment for the felony-firearm conviction followed by concurrent sentences of life imprisonment for the murder conviction and 10 to 20 years' imprisonment for the armed robbery conviction. This Court affirmed defendant's convictions and sentences. *People v Flint*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 1996 (Docket No. 185201). In April 2014, the trial court granted defendant's fourth motion for relief from judgment and awarded defendant a new trial. The prosecution now appeals by leave granted, arguing that the trial court abused its discretion in granting defendant's motion for relief from judgment. For the reasons set forth below, we reverse.

Defendant's convictions arise from the shooting death of Cassandra Dice on December 28, 1993, during a robbery of a Burger King restaurant located on Warren Avenue in Dearborn Heights, Michigan. Dice was a manager at the restaurant. Defendant's first trial ended in a mistrial in December 1994 due to a hung jury. On retrial, defendant and his co-offender, Clayton Wilkins, were tried together, but before separate juries. Defendant was convicted of first-degree felony murder, armed robbery, and felony-firearm. Codefendant Wilkins was convicted of second-degree murder and felony-firearm.

On November 8, 1996, this Court affirmed defendant's convictions and sentences, concluding that the evidence was sufficient to establish beyond a reasonable doubt that defendant had either the necessary intent to kill his victim, or created a high risk of death, by pointing the gun at her. This Court further concluded that the jury instructions adequately defined the offense

of felony murder and informed the jury of the state of mind the prosecution was required to prove. *Flint*, unpub op at 1-2.

The present appeal stems from defendant's filing of a fourth motion for relief from judgment in 2012, in which he asserted that he had newly discovered evidence that would result in an acquittal upon retrial. Specifically, defendant represented that in 2012, he learned for the first time of a crime lab report dated January 10, 1994, in which Michigan State Police (MSP) firearms specialist Jon L. Stanton concluded that there was no gunshot residue on a hooded sweatshirt or leather jacket that was seized from defendant at the time of his arrest, which happened 26 hours after the shooting.

In its response to defendant's motion for relief from judgment, the prosecution argued that this evidence was not newly discovered. The prosecution conceded that it was likely that *defendant* did not have a copy of the lab report before 2012. However, it argued that *defendant's* attorneys were aware of the evidence at the time of his trials. The prosecution relied on the fact that Stanton was listed as a potential witness on two witness lists and that he was waived as a witness at both trials by defendant. The prosecution further argued that even if the lab report had been available and presented at trial, it would not have affected the outcome.

In its April 1, 2014, opinion and order granting defendant's motion for relief from judgment and a new trial, the trial court held that defendant was entitled to a new trial based on the newly discovered MSP lab report. It further found that the evidence was not discoverable with reasonable diligence, noting that defendant was unable to obtain the results until he had the funds available to hire the investigator in 2012. Finally, the court concluded that there existed "a reasonable probability that the test results would have altered the outcome of the trial inasmuch as there is a reasonable probability they could have been used to impeach the witness identification, and potentially persuade the jury to acquit defendant."

This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of fact supporting its decision for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes or a trial court makes an error of law. *Id.* at 628-629. Further, we review the proper interpretation and application of the court rules de novo. *People v Cole*, 491 Mich 324, 329; 817 NW2d 497 (2012).

The prosecution argues that the trial court abused its discretion when it granted defendant's motion for judgment relief because such relief was precluded where defendant did not argue a retroactive change in the law, and did not establish the existence of newly discovered evidence.

Motions for relief from judgment are governed by MCR 6.500 *et seq.* Except for two exceptions, after August 1, 1995, a defendant is only entitled to file one motion for relief from judgment. MCR 6.502(G)(1). However, MCR 6.502(G)(2) permits the filing of a successive motion under two limited circumstances:

A defendant may file a second or subsequent motion *based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion*. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions. [Emphasis added.]

In *Swain*, this Court held that “MCR 6.502(G)(2) provides the *only* two exceptions to the prohibition of successive motions.” *Swain*, 288 Mich App at 632 (emphasis added).

Once a defendant establishes that his successive motion falls within one of the two exceptions articulated in MCR 6.502(G)(2), then, and only then, are the provisions of MCR 6.508(D)(3) implicated. *Id.* at 632-633. MCR 6.508(D)(3) applies to successive motions and provides that “if a motion for relief from judgment ‘alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter,’ a defendant is not entitled to relief unless the defendant demonstrates ‘good cause’ and actual prejudice.” *Id.* at 632, quoting MCR 6.508(D)(3).

The trial court found that defendant satisfied MCR 6.508(D)(3) because the evidence was not discoverable with reasonable diligence. We believe that the trial court clearly erred in making this determination. Despite the trial court’s findings to the contrary, defendant did not establish that the lab report from the gunshot residue testing was “not discovered before the first” motion for relief from judgment. Indeed, it appears from the lower court record that both of defendant’s attorneys likely knew of the lab report at the time of defendant’s trial and retrial.

Defendant had the burden of establishing entitlement to relief from judgment. MCR 6.508(D). In support of his claim that his attorneys never received the report, defendant represents that when he received copies of his files from his attorneys, the lab report was not contained therein. However, this simply confirms that trial counsel failed to provide a copy to defendant; it does not establish that defendant’s trial counsel were unaware of the evidence. Indeed, the available record supports that defendant’s trial attorneys were aware of the lab report. The gunshot residue testing of defendant’s clothing was performed by MSP firearms specialist Jon L. Stanton. Stanton authored the laboratory report in which he concluded that no gunshot discharge residue was detected on the sleeve of either the sweatshirt or the leather jacket seized from defendant. Stanton was listed on two of the prosecution’s witness lists and his association with the “MSP Northville Crime Lab” was specifically noted. It is undisputed that defendant’s attorneys waived Stanton’s testimony and this is verified by a review of the witness list on which the court indicated that Stanton’s testimony was “waived.” Therefore, it is undisputed that defendant’s attorneys were aware of Stanton as a witness; it is unlikely that an attorney, let alone two, would waive a potential witness’s testimony without having some idea of the nature of that testimony. And more importantly, neither attorney would have been able to lay a foundation, making the evidence admissible—i.e., that the clothes that were tested were, in fact, the same clothes that defendant was wearing the day of the shooting.

Based on the foregoing, defendant has not persuasively demonstrated the existence of new evidence “that was not discovered before the first motion” for relief from judgment.

Evidence is not newly discovered if the defendant *or defense counsel* was aware of the evidence at the time of trial. *People v Rao*, 491 Mich 271, 281; 815 NW2d 105 (2012). Because the evidence on which defendant's successive motion for judgment relief was based was not newly discovered, the trial court was prohibited from granting defendant's motion. *Swain*, 288 Mich App at 633, 635. Accordingly, the trial court abused its discretion when it granted defendant relief from judgment.

Moreover, assuming arguendo that the lab report was considered "new evidence" that was not discoverable before his first motion for relief, defendant still would not be entitled to relief. After a trial court has determined that the successive motion falls within one of the two exceptions contained in MCR 6.502(G)(2), the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) become relevant. *Id.* at 635-636. As a result, defendant had to establish "actual prejudice," which requires a showing that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i). In this case, defendant has not established that if the report had been admitted into evidence, he would have had a reasonably likely chance of acquittal.

The potential exculpatory value of the lab report was dubious. The items of clothing were seized from defendant more than 24 hours after the actual shooting, making its relevance and admissibility highly doubtful. Thus, even if admissible, any absence of gunshot residue would have easily been explainable. For instance, given that amount of time, defendant could have cleaned his clothes, and more problematic for defendant, it is questionable whether the clothes that Stanton tested were the same ones worn by defendant at the time of the shooting. The report indicates that a leather jacket was tested; however, one witness testified that defendant was wearing a knitted jacket. Moreover, two witnesses specifically identified defendant at trial as the man they saw entering the drive-thru window, pointing a gun at and then shooting Dice. One of these witnesses identified defendant in a photo array on the night of the shooting and in a corporeal lineup two weeks later. In addition, defendant was a known acquaintance of co-defendant Wilkins, who was positively identified as the driver of the get-away vehicle. Finally, defendant's own *unprompted* statement when he was taken into custody to the effect that he looked nothing like the Burger King shooter suggested knowledge of the events and consciousness of guilt. In the face of this questionably admissible evidence, the report of a lack of gunshot residue on defendant's clothing over 24 hours after the shooting would not have provided defendant with a reasonably likely chance of acquittal. Accordingly, defendant did not establish actual prejudice to warrant relief from judgment.

Reversed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens